

Notes

Should Copyright Law Make Unpublished Works Unfair Game?*

I. INTRODUCTION

The Constitution gives Congress the power “To promote the progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings.”¹ This grant of Congressional power is where copyright begins, and where it should end. To go beyond what is “necessary and proper”² to achieve these constitutional goals usurps states’ rights and is therefore unconstitutional. Copyright’s sole purpose must be to facilitate the growth of society’s store of knowledge by encouraging authors to create “writings”³ — the original purpose of the Constitution’s copyright clause.⁴

Congress has chosen to accomplish its constitutional mandate by awarding certain exclusive rights to authors,⁵ such as the right to reproduce a work and to

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1. U.S. CONST. art. I, § 8, cl. 8. The grammatical structure of the clause makes “authors” refer to “science.” While in modern times this use seems illogical, in colonial times, “science” referred to authors’ works, and “useful arts” referred to inventions. *See, e.g.,* M. NIMMER, NIMMER ON COPYRIGHT § 1.03 [A] (citing *Graham v. John Deere Co.*, 383 U.S. 1 (1966)).

2. U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof.”).

3. “Writings” has been interpreted very loosely by Congress. The current Copyright Act grants copyright protection to all “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a) (1976 Act). A few examples of “original works of authorship” listed by that section are literary works, musical works, dramatic works, pantomimes, sculptural works, motion pictures, and sound recordings. *Id.*

4. “Society affords authors copyright protection . . . as a reward for that aberrant spark of uniqueness that copyright theory views as essential to society’s welfare.” Comment, *Toward a Constitutional Theory of Expression: The Copyright Clause, the First Amendment, and the Protection of Individual Creativity*, 34 U. MIAMI L. REV. 1043, 1066 (1980). *See infra*, discussion under Part II.

5. 17 U.S.C. § 106, (1976 Act), Exclusive Rights in Copyrighted Works, reads as follows:

Subject to sections 107 through 118, the owner of the copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Id.

Patent law, the counterpart to copyright granted in the same clause of the Constitution, protects devices and inventions that embody a new idea or previously unknown principle. BLACK’S LAW DICTIONARY 1013 (5th ed.

distribute it.⁶ However, these rights are explicitly made subject to certain limitations,⁷ one of which is the doctrine of fair use.⁸ Although fair use was originally a doctrine created by judicial fiat in an attempt to keep the copyright laws from allowing overly extensive monopolies on a work,⁹ fair use has now been codified by Congress in the copyright statute.¹⁰ Despite this codification, however, fair use in fact remains primarily a judicially maintained rule, as Congress meant it to be.¹¹

Unfortunately, congressional codification of fair use has done little to clarify what many have called a doctrine that is "the most troublesome in the whole law of copyright."¹² And yet, as troublesome as fair use is, it becomes even more so when that doctrine is applied to unpublished works. To date, only three cases have addressed the application of the fair use doctrine to unpublished works;¹³ perhaps not surprisingly, all are from the Second Circuit. In only one case, *Harper & Row, Publishers, Inc. v. Nation Enterprises*,¹⁴ did the Supreme Court grant certiorari. *Harper & Row* was also the first case to grapple with applying fair use to unpublished works, and it, by no stretch of the imagination, came close to settling the turmoil surrounding fair use and unpublished works.

This Note argues that courts are floundering in applying fair use to unpublished works because they are focusing narrowly on the purposes of fair use rather than on the broader purposes of copyright. Consequently, the courts have—perhaps unknowingly—allowed themselves to be swayed by the privacy aspects of unpublished works cases. This influence is causing the courts to fall far short of their declared goal of using fair use to help copyright accomplish its only constitutional purpose: promoting "the progress of Science and useful Arts."

1979). Patent law has goals somewhat similar to copyright, but such discussions are beyond the scope of this paper.

6. 17 U.S.C. § 106(1), (3) (1976 Act).

7. 17 U.S.C. § 106 (1976 Act), which grants "Exclusive Rights in Copyrighted Works," begins with the phrase "Subject to sections 107 through 118" Those sections are express limitations on the § 106 rights.

8. 17 U.S.C. § 107 (1976 Act).

9. See, e.g., *Iowa State Univ. Research Found., Inc. v. American Broadcasting Co.*, 621 F.2d 57 (2d Cir. 1980) (fair use "permits courts to avoid rigid application of the copyright statute when . . . it would stifle the very creativity which that law is designed to foster").

10. 17 U.S.C. § 107 (1976 Act).

11. "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 65-66 (1976); see also the text of 17 U.S.C. § 107 (1976 Act) which directs courts making a fair use determination to "include" in its consideration the listed factors. *Id.* "Include" is defined as "illustrative and not limitative." 17 U.S.C. § 101 (1976 Act).

12. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam). See also, e.g., Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STANFORD L. REV. 1343, 1344 (1989) (noting that there is much hostility expressed toward copyright, and citing numerous authors of critical commentaries).

13. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1984); *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987); and *New Era Publications Intern. v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989).

14. 471 U.S. 539.

II. COPYRIGHT'S CONSTITUTIONAL PURPOSE

To determine how fair use should fit into the copyright scheme, it is first necessary to understand the purpose of the Constitution's copyright clause. Although there is some disagreement over who first proposed a constitutional clause detailing copyright powers, there is evidence that James Madison submitted a copyright clause to be examined by the Committee of Detail at the Constitutional Convention. Madison's proposal read: "To secure to literary authors their copyrights for a limited time. To encourage by premiums and provisions the advancement of useful knowledge and discoveries."¹⁵ Although there is no record of debate about the power or the clause,¹⁶ the language itself gives clear evidence of the purpose the founding fathers envisioned for what later became known as the copyright clause.¹⁷

The final text of the Constitution varies little from Madison's proposal: "Congress shall have the power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings."¹⁸ The purpose, indicated by the clause's language, must be to increase society's store of knowledge, by providing incentives to authors to create. Thus, benefiting the individual fosters social progress which ultimately benefits society. The Supreme Court explicitly recognized this concept in *Mazer v. Stein*:¹⁹ "The economic philosophy behind the [copyright] clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"²⁰

Because of the incentive structure of copyright, many commentators and judges expressly state or act on the assumption that copyright creates private property in creative works, thus enabling the market to simultaneously encourage production and distribution of works.²¹ However, strict adherence to the view that copyright is simply a grant of property would allow a work to be absolutely controlled by the owner. One commentator has noted that this view

15. Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109, 113 (1929) (citing 3 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 555-56). Fenning also pointed out that 1 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 130, similarly notes that an identical proposal was submitted on the same day, but that the author was unknown; that DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION (House Document No. 398) (1927) says Madison's journal for that day recorded a proposal from Madison "to secure to literary authors their copy rights for a limited time;" and that Madison's journal also states that Mr. Pinckney of South Carolina proposed "to secure to authors exclusive rights for a certain time." *Id.* at 112.

16. *Id.* at 113-14.

17. The purpose of the copyright clause can also be inferred from copyright's origins: England's Statute of Anne, enacted in England in 1709, which was applauded as a "major step forward" because it recognized that the source of the copyright interest was the "creative act of authorship, rather than . . . the entrepreneurship of the printer." Ringer, *Two Hundred Years of American Copyright Law*, in TWO HUNDRED YEARS OF ENGLISH AND AMERICAN PATENT, TRADEMARK AND COPYRIGHT LAW 117, 121 (1977). The distinction between protecting the "creative act of authorship" and protecting the "entrepreneurship of the printer" is a subtle but important one: copyright encourages creation of new works, not the copying of works already created.

18. U.S. CONST. art. I, § 8, cl. 8.

19. 347 U.S. 201 (1954).

20. *Id.* at 219.

21. See, e.g., Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 30 J. COPYRIGHT SOC'Y 253 (1983).

goes too far, postulating that the copyright-as-property view obscures copyright's true purpose because it allows too much restriction of access to a work.²² That restriction then defeats the purpose of copyright, which he stated as "promotion of learning."²³

If an author is allowed to use his copyright solely to *prevent* his works from enriching society's store of knowledge, copyright is being used unconstitutionally. Therefore, whenever copyright is an issue, the facts of the case must be carefully analyzed to ensure the fulfillment of the constitutional mandate of *encouraging* the creation of works,²⁴ lest inadvertent violations of another part of the Constitution, the first amendment, are allowed.²⁵

III. STATUTORY LAW OF FAIR USE GENERALLY

Justice Story is often credited with creating fair use.²⁶ In *Folsom v. Marsh*²⁷ Justice Story recognized that there could be a use of a copyrighted work that was not an infringement if the use was "justifiable."²⁸ Interestingly, the factors Justice Story enumerated for deciding whether a use was justifiable closely resemble the factors Congress chose to list in its codification of fair use more than a hundred years later.²⁹ While there are marked similarities between the two formulations, the variations in wording are noteworthy. Where Justice Story considered whether the infringing work would "supercede the objects of

22. Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987).

23. Patterson, *supra* note 22, at 7.

24. "[T]he goals of the Constitution are best served by encouraging, not suppressing, individual expression." Comment, *supra*, note 4 at 1045 (arguing that "the copyright clause grants Congress the power to legislate to encourage individual communication, and that underlying both the copyright clause and the first amendment is a common perception of the value of individual expression, both to society and to the individual").

25. "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I. The first amendment would seem to be violated if, with no constitutional authorization to do so, Congress were to allow an interpretation of its laws (here, the Copyright Act) that would require a court to prohibit certain types of speech.

26. See, e.g., BROWN & DENICOLA, CASES ON COPYRIGHT: UNFAIR COMPETITION, AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL, AND ARTISTIC WORKS 294 (5th ed., 1990).

27. 9 Fed. Cas. 342, No. 4901 (C.C.D. Mass. 1841).

28. *Folsom*, 9 Fed. Cas. at 348.

29. Justice Story wrote:

In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work.

Folsom, 9 Fed. Cas. at 348.

The Copyright Act, in turn, states:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; [compare "the degree in which the use may . . . supersede the objects of the original work," above]

(2) the nature of the copyrighted work; [compare "nature and objects of the selections made," above]

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; [compare "quantity and value of the materials used," above] and

(4) the effect of the use upon the potential market for or value of the copyrighted work [compare "the degree in which the use may prejudice the sale, or diminish the profits," above].

17 U.S.C. § 107 (1976 Act).

the original work,"³⁰ Congress directs courts to consider "the purpose and character of the use."³¹ This latter consideration tends to direct courts to focus heavily on the infringing work's function in the marketplace, giving weight to whether a work is "commercial" or "for nonprofit educational purposes," instead of focusing on whether the infringing work's function is the same as the original work.³²

Further enforcing the perception that congressional approval of a fair use depends on its function in the marketplace is the language of Section 107 itself. That section states that "the fair use of a copyrighted work, . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."³³ This language indicates, and commentators believe,³⁴ that Congress wanted a finding of fair use when there is "market failure." That is, in situations where the copyrighted work is not available to the potential user; or the market does not adequately value the potential user's work, such as with a work's teaching or political value; or when the owner is unlikely to allow the market to function, as when the user wants to use the work for parody or criticism.

However, the distinction between determining the function of a work only with reference to its function in the marketplace and determining its function relative to another work is blurred somewhat by the flexible nature of the fair use statute. A House Report explaining the general intention behind the fair use codification stated:

The statement of the fair use doctrine in section 107 offers *some guidance* to users in determining when the principles of the doctrine apply. . . . Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the court must be free to adapt the doctrine to particular situations on a case-by-case basis.³⁵

This "case-by-case" admonishment by Congress should be adhered to by courts. Since the Copyright Act is a statute meant to effect a constitutional mandate, the statute must be interpreted in light of that mandate. Because the purpose of copyright is to encourage the creation of new works, the courts must look carefully to see if a particular use will — if allowed — discourage future potential authors from creating. The type of use most likely to discourage potential creators is one that "steals" from, and then competes with, an original. If courts are to accomplish the encouragement goal of copyright, they must keep that goal firmly in mind when determining whether a particular use is fair. Thus, the courts must not only consider Congress' factor of "purpose and character of the use" but also whether the use may "supersede the objects of the original work."

30. *Folsom v. Marsh*, 9 Fed. Cas. 342, No. 4901 (C.C.D. Mass. 1841).

31. 17 U.S.C. § 107(1) (1976 Act).

32. My reference to works as "infringing" or "original" is solely to ease identification. It is not a statement connoting that one work has unfairly competed with the other by taking the other's entire work product; nor do the references mean that the "infringing" work lacks original elements.

33. 17 U.S.C. § 107 (1976 Act).

34. *See, e.g.,* Gordon, *supra* note 21, at 260.

35. H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 53, 65-66 (1976).

IV. COMMON LAW OF FAIR USE GENERALLY

Because Congress' codification of fair use merely sanctions the courts' applications of fair use,³⁶ it, in reality, remains a common-law doctrine. Therefore, an examination of case law is necessary to understand fair use.

As noted above,³⁷ the first indication that copyright was not always an easily determined question came from Justice Story in *Folsom v. Marsh*,³⁸ when he spoke of the "nice balance" between when there is, and when there is not, copyright infringement despite obvious copying.³⁹ Justice Story wrote: "[C]opyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent."⁴⁰

Fair use has been somewhat more recently described by one commentator as a "privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright."⁴¹ Several courts have accepted this characterization.⁴² The purpose of this "privilege" has been stated to be premised on the belief that an absolute monopoly granted to a creator would lead to unjustifiably restricted access for the public.⁴³

Originally, fair use was viewed as an equitable defense to a claim of copyright infringement, and many cases and commentators still refer to fair use as a defense. However, the 1976 amendments to the Copyright Act fashioned fair use into an exception to the creator's rights in his creation, rather than just a defense.⁴⁴ *Sony Corp. of America v. Universal City Studios, Inc.*⁴⁵ typifies this outlook in construing Sections 106-07 of the Copyright Act:

All reproductions of the work . . . are not within the exclusive domain of the copyright owner; some are in the public domain. Any individual may reproduce a copyrighted work for a 'fair use;' the copyright owner does not possess the exclusive right to such a use. . . . [A]nyone . . . who makes a fair use of the work is not an infringer of the copyright with respect to such use.⁴⁶

This interpretation of how fair use fits into the scheme of the rights granted by copyright is slightly different than the "equitable defense" description of fair use common before its codification. However, the actual distinction between these different procedural applications is of little importance to this discussion,

36. See *supra* note 11.

37. See *supra* notes 26-29 and accompanying text.

38. 9 Fed. Cas. 342.

39. 9 Fed. Cas. at 344. See also *BROWN & DENICOLA*, *supra* note 26, at 294.

40. *Folsom*, 9 Fed. Cas. at 343.

41. H. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* § 125 at 260 (1944).

42. See, e.g., *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977); *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966).

43. See generally, H. BALL, *supra* note 41, at §§ 124-38; M. NIMMER, 3 *NIMMER ON COPYRIGHT* § 13.05; Patterson, *supra* note 22.

44. 17 U.S.C. §§ 106-07 (1976 Act). See also, e.g., *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 426 (1984).

45. *Sony*, 464 U.S. 417.

46. *Id.* at 425.

because if fair use is found, either procedural application will lead to the same conclusion of no liability.

However, the equitable origin of fair use has left its mark, and the character of this equitable usage remains vitally important: courts applying fair use often speak of its "equitable nature."⁴⁷ This interpretation often leaves courts deciding a fair use case primarily, or at least giving undue weight to, factors the courts consider "unfair." Instead of examining the problem logically and determining whether to apply fair use on the basis of how to best serve copyright's constitutional purposes, courts tend to look for a "villain."

This was particularly evident in the Supreme Court's analysis of *Harper & Row*.⁴⁸ In that case, former President Gerald Ford had written his memoirs and sold the rights to Harper & Row. Harper & Row, in turn, had sold excerpts to Time magazine. Before Time was due to publish, however, The Nation magazine gained unauthorized access to President Ford's manuscript and published its own excerpts. In deciding against The Nation and refusing to find fair use of President Ford's copyrighted manuscript, the Court insinuated that The Nation was a "chiseler"⁴⁹ who had "knowingly exploited a purloined manuscript"⁵⁰ and had thus committed "piracy"⁵¹ because The Nation had gained access to President Ford's work surreptitiously. Furthermore, the majority opinion pointed out, The Nation did not add any of its own work,⁵² but instead worked "directly from the purloined manuscript"⁵³ of President Ford's work. The Court directly and explicitly factored into its analysis what it called "the propriety of the defendant's conduct"⁵⁴ because, it said, fair use required "fair dealing."⁵⁵

Despite the effect of fair use's "equitable nature" on the way courts actually apply the doctrine, courts still profess to apply fair use whenever copyright "would stifle the very creativity which that law is designed to foster."⁵⁶ Justice Story, in *Folsom*, said that there could be no fair use if "the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient . . . to constitute a piracy."⁵⁷ This pronouncement accurately

47. See, e.g., *Harper & Row*, 471 U.S. at 560 ("Whether [a use] is or is not fair must be judged according to the traditional equities of fair use."); *Sony*, 464 U.S. at 448 (referring to fair use as an "equitable rule of reason").

48. 471 U.S. 539.

49. The Court pointed out that The Nation could have bid for the right to abstract excerpts from President Ford's book, and then implied that The Nation was less than honorable by saying that fair use should not apply equally to "a true scholar and a chiseler who infringes a work for personal profit." *Id.* at 563 (quoting from Hearings on Bills for the General Revision of the Copyright Law before the House Committee on the Judiciary, 89th Cong., 1st Sess., 8, pt. 3, at 1706 (1966) (statement by John Schulman)).

50. *Harper & Row*, 471 U.S. at 563.

51. *Id.* at 556.

52. "Mr. Navasky [the writer of the article and The Nation's editor] attempted no independent commentary, research or criticism . . ." *Id.* at 543.

53. *Id.* at 542.

54. *Id.* at 562 (quoting M. NIMMER, 3 NIMMER ON COPYRIGHT § 13.05[A]).

55. *Id.* at 562 (citing *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) in support of that proposition, despite the fact that the *Time* court found fair use even though the defendant had taken images of film from *Time* without consent).

56. See, e.g., *Harper & Row*, 471 U.S. at 550 n.3, 555; *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980).

57. 9 Fed. Cas. at 348.

disclosed just how fair use should function. Following Justice Story's formulation, fair use should be a qualification of copyright; when copyright has been invaded in only the technical sense, the use is "fair" because there has been no "appropriation" in the sense of stealing another's work.

The use-but-no-appropriation definition of fair use seems to have been lost by many later courts and perhaps by Congress. Congress' "factors" are indeed somewhat useful for determining if there has been such an appropriation. However, the factors would be more effective and less susceptible to distortion if they were used, not as an end in themselves, but instead as a means of focusing on the respective functions of the putatively infringing work and the copyrighted work. The fair use factors would best serve the constitutional purpose of copyright if they were used not to determine whether there has been fair use, but whether the putatively infringing use should be allowed because it does not appropriate to an injurious extent.

This objective of focusing on whether the two works have the same function is necessary because fair use and copyright must work together to reach the constitutionally mandated goal of encouraging new creations. Because this constitutional goal is what must be sought, the same analysis should apply to all works, whether or not they are already published.

A noted commentator has argued that fair use should be granted whenever three conditions are met: 1) there is "market failure" (that is, the defendant cannot appropriately purchase the use through the market, because, for instance, there are very high transaction costs); 2) allowing the use would serve the public interest; and 3) the copyright owner's economic incentives would not be *substantially* impaired by allowing the fair use.⁵⁸ This test, or at least substantial parts of it, have been adopted by several courts, and, most importantly, by the Supreme Court in *Harper & Row*.⁵⁹ While these three conditions for granting fair use are useful in determining if a use is fair, they, like the statutory factors, suffer from shortsightedness: they fail to focus on the function of the two works, so as to encourage the creation of new works, while still protecting the creation of old works.

V. FAIR USE OF UNPUBLISHED WORKS

A. *Statutory Basis*

The Copyright Act of 1976 explicitly preempts the common law,⁶⁰ which generally denied a finding of fair use when the original work was unpublished. Common-law copyright covered a work from the time of its creation until the moment it was published, when federal statutory copyright attached. As long as the work remained unpublished, however, the work was regarded as the absolute, perpetual property of the owner; this included the right to disseminate, and

58. Gordon, *supra* note 21.

59. 471 U.S. at 559.

60. 17 U.S.C. § 301 (1976 Act).

also the right to control when *and if* that dissemination occurred.⁶¹ Modern statutory copyright law not only preempts the common-law copyright, but makes it useless, because statutory copyright attaches as soon as the work is "fixed in any tangible medium"⁶² and explicitly grants the right to distribute.⁶³ The new preemption and attachment of federal copyright protection at the time of fixation "affords authors the greater benefits accruing from federal protection and also accommodates public need for dissemination, because the term of federal copyright protection is limited"⁶⁴ thus thrusting even unpublished works into the public domain after that specified period of protection. The inescapable conclusion is that Congress has taken away the common-law right to perpetually restrict access to an unpublished work. It is therefore arguable that Congress additionally meant to make unpublished works also subject to fair use.

Some may argue, however, that the grant of a right of distribution⁶⁵ manifests the impossibility of a fair use of an unpublished (undistributed) work, because such a use would nullify the right to be the first to distribute a work. However, most agree that as currently written the copyright statute applies fair use to unpublished works, since the grant of "exclusive rights" is made expressly limited by other sections,⁶⁶ including Section 107, Limitations on Exclusive Rights: Fair Use.⁶⁷ Because Congress made no distinction between published and unpublished works, it must be assumed that Congress wanted fair use to apply to unpublished works as well as published works.

Further antithetic to the argument that a first distribution right nullifies the applicability of fair use to an unpublished work is the proposition that if a use of an unpublished work is indeed fair, there has been no first distribution. By definition, a "fair" use is not a distribution of a work because it is simply a *use*, and not a taking. The Copyright Act itself, in granting the right to distribute, indicates that a distribution is a form of transfer of ownership;⁶⁸ a use can only be deemed fair if it does not supplant or substantially "take" the work,

61. See, e.g., *Harper & Row*, 471 U.S. at 553; Kernochan, *Protection of Unpublished Works*, 33 J. COPYRIGHT Soc'y 322 (1986).

62. 17 U.S.C. § 102(a) (1976 Act).

63. 17 U.S.C. § 106(3) (1976 Act).

64. Comment, *supra* note 4, at 1046 n.8 (discussing Copyright Act of 1976, 17 U.S.C. §§ 301-02 (1976 Act)).

65. "The owner of a copyright under this title has the exclusive rights to do and to authorize . . . [the distribution of] copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending . . ." 17 U.S.C. § 106(3) (1976 Act).

66. 17 U.S.C. § 106 (1976 Act), Exclusive Rights in Copyrighted Works, expressly conditions those exclusive rights as being "[s]ubject to sections 107 through 118." *Id.*

67. 17 U.S.C. § 107 (1976 Act) begins as follows:

Notwithstanding the provisions of section 106 [which grants the copyright owner exclusive rights], the fair use of a copyrighted work, *including such use by reproduction in copies or phonorecords or by any other means specified by that section*, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."

Id. (emphasis added).

68. "To distribute copies . . . to the public by sale or other transfer of ownership . . ." 17 U.S.C. § 106(3) (1976 Act) (emphasis added). This indicates that to distribute a work, the distributor must have the work itself, or some embodiment of the work. A use that is deemed fair can only be one where the use does not supplant or substantially "take" the work, and so a distribution of a fair use is not a distribution of the original work.

and therefore a distribution of a fair use is not a distribution of the original work.

The registration provision of the Copyright Act is additional evidence that Congress did not want to use copyright to protect privacy interests. Before bringing an action, a copyright owner must register his copyright,⁶⁹ which requires making a public record of the work by filing it with the Copyright Office.⁷⁰ The purposes of the public filing are two-fold: "First, it identifies the copyrighted work in connection with its copyright registration. . . . Second, it provides copies for the use of the Library of Congress and thereby enriches the national store of books and other works."⁷¹ These requirements thus mandate the sacrifice of privacy interests to those of copyright, if the owner of an unpublished work wishes to avail himself of copyright protections.

Yet more evidence comes from the right of a copy owner "to display that copy publicly, either directly or by the projection of no more than one image at a time" regardless of authorization from the copyright owner.⁷² Original works, when fixed, are technically "copies" under the statute, so that one who receives a letter owns a "copy" that he is free to display.⁷³ Thus, it is evident that neither in the language nor in the structure of the Copyright Act is there any consideration of a work's published or unpublished status in determining what rights do or do not attach to a work.

B. Case Law

Despite the language of the Copyright Act, which evidences no special consideration for unpublished documents, many believe that "[t]he applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner."⁷⁴ This belief is shared by the Supreme Court, which made a similar finding in *Harper & Row*.⁷⁵ In *Harper & Row*, the Court held that a magazine which had summarized and quoted from the unpublished memoirs of former President Gerald Ford did not qualify for the fair use exemption because there is a strong presumption against fair use of an unpublished work. Because of this presumption, taken together with the rest of the factors from the fair use statute, the Supreme Court said that unpublished

69. 17 U.S.C. § 411 (1976 Act), Registration and Infringement Actions, states in pertinent part, "no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title." *Id.*

70. 17 U.S.C. § 408 (1976 Act).

71. Note, *Copyright and Privacy Protection of Unpublished Works — The Author's Dilemma*, 13 COLUM. J.L. & Soc. PROB. 351, 378 n.136 (1977).

72. 17 U.S.C. § 109(c) (1976 Act).

73. "The term 'copies' includes the material object, other than a phonorecord, in which the work is first fixed." 17 U.S.C. § 101 (1976 Act).

74. Kernochan, *supra* note 61, at 322 (citing S. REP. NO. 94-473, 94th Cong., 1st Sess. 64 (1975)).

75. 471 U.S. 539.

works normally are not subject to fair use.⁷⁶ Later courts have—in effect, if not explicitly—interpreted this to be a determinative factor.⁷⁷

In considering the four factors of fair use law — purpose, nature, amount of use, and effect on the market — the Court in *Harper & Row* gave special weight to the *nature* of the work, which it said was unpublished.⁷⁸ The Court said the “unpublished nature” of the work was important because of the right of the copyright owner to control first publication.⁷⁹ However, some have argued that “nature” refers not to the published or unpublished status of the work, but instead to the type of work it is, such as factual or fictional.⁸⁰

Despite the fact that the Court seemed to base its decision on the fact the work was unpublished and that the user's access to the work had been gained less than reputably,⁸¹ the Court said it was giving the most weight to the fair use statute's fourth factor: the effect on the market of the copyrighted work.⁸² But in doing so, the Court used no facts to decide that *The Nation's* use would impair the market of Ford's book, other than *Time's* statement that it would not perform its contract because of *The Nation's* publication. While superficially it would seem that this statement presents clear evidence of effect on the market, there is in reality no proof that *The Nation's* publication of information that *was protected by copyright* is what caused the injury,⁸³ because of the highly factual nature of Ford's book. Due to that highly factual nature, and copyright's refusal to protect mere facts, it is possible that large segments of Ford's book could not be protected by copyright.

The fact/expression dichotomy, where only expressions and “creative” works can receive copyright protection,⁸⁴ serves to create further confusion in the fair use realm. Although it is clear the dichotomy exists, it is often unclear whether, for a particular use, there is no infringement because fair use negates copyright, or whether there is simply no copyright in the first place because the parts of the work copied are non-copyrightable facts. This confusion is at least in part caused by the type of work that is often the subject of copying: collections of facts. Delineating “fact” is a difficult task; “the distinction between literary form and information or ideas is often elusive in practice.”⁸⁵ The distinction is not made easier by the ability of an astute copier to take an expression from a copyrighted work, reconstruct it, and then present that expression in his own work as a fact. For example, the expression, “I told my friends that I

76. *Id.* at 555.

77. See *New Era*, 73 F.2d at 583 (“Where use is made of materials of an ‘unpublished nature,’ the second fair use factor has yet to be applied in favor of an infringer, and we do not do so here.”).

78. *Harper & Row*, 471 U.S. at 564.

79. *Id.*

80. See, e.g., Dratler, *Distilling the Witches Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233 (1988).

81. See *supra*, notes 44-55 and accompanying discussion.

82. *Harper & Row*, 471 U.S. at 568.

83. *Id.* at 602-03 (Brennan, J., dissenting).

84. 17 U.S.C. § 102(b) (1976 Act); see *Harper & Row*, 471 U.S. at 547 (majority opinion), 582-83 (Brennan, J., dissenting); *Mazer v. Stein*, 347 U.S. 201 (1954); *Whelan Assocs. v. Jaslow Dental Laboratory*, 797 F.2d 1222 (3d Cir. 1986).

85. *Harper & Row*, 471 U.S. at 582-83 (Brennan, J., dissenting).

believe in astrology," taken from an autobiography, can be a fact in the new work when stated, "Smith told confidants he believed in astrology." Furthermore, what is often at issue is the *fact* that someone said the words. In *New Era*, the dissent noted that while L. Ron Hubbard's statement, "The trouble with China is, there are too many Chinks here," clearly is Hubbard's opinion and his expression of it, what biographers want to relate is the fact that Hubbard said these words.⁸⁶

Because President Ford's memoirs contained a significant factual content, at least one commentator has argued that the court in *Harper & Row* "truncated substantially the fair use doctrine[,] [b]ecause the Court has diminished the utility of fair use for accommodating the broad dissemination of factual works indisputably required by the copyright law and the first amendment."⁸⁷

However, even if the Supreme Court did not base its decision on the correct reasoning,⁸⁸ the result is correct. The Nation sought to accomplish the same purpose as Ford's book, and so could not be a fair use. The four-point analysis suggested by Congress hinted that disallowing fair use was the right result. Essentially, the purpose of President Ford's book was to tell the public how the events that shaped his presidency looked from his perspective. The Nation, duplicatively, sought to tell the public how President Ford said those events looked. That is, The Nation sought to write an article that would tell the public what President Ford was going to tell the public in his book. Therefore, The Nation's work sought to "supercede the objects of the original work;"⁸⁹ as such, it was not a "use" but was instead a "taking" that rightly was not allowed.

In *Salinger v. Random House, Inc.*,⁹⁰ the Second Circuit seemed to hold that even a paraphrase of an unpublished work is not allowed by fair use. This overly strict decision, though, was almost definitely influenced by privacy concerns, because this case centered on the unauthorized use of portions of private letters and papers to construct a biography about the still-living and intensely private author, J.D. Salinger.⁹¹

A few years later, the Second Circuit decided *New Era Publications, International v. Henry Holt & Co.*⁹² This case explicitly reaffirmed *Salinger*,⁹³ although it did so in dicta, because the court affirmed the denial of an injunction on grounds other than a finding of no fair use.⁹⁴

In *New Era*, a biographer drew sparsely from a large number of published and unpublished works of a dead author. The small percentage of copyrighted material taken from the original works, combined with the criticism and com-

86. *New Era*, 873 F.2d at 587 n.3 (Oakes, C.J., dissenting).

87. Francione, *Facing The Nation: The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. PENN. L. REV. 519, 597 (1986).

88. See *supra*, discussion accompanying notes 48-55.

89. *Folsom*, 9 Fed. Cas. at 348.

90. 811 F.2d 90.

91. Sallinger (1919 -), wrote *The Catcher in the Rye*, *Fanny and Zooey*, *Raise High the Roofbeam, Carpenters*, and *Nine Stories*.

92. 873 F.2d 576.

93. *Id.* at 583.

94. *Id.* at 584.

ment purpose of the use, seemed to present the best possible fact situation to find fair use of an unpublished work. The *New Era* court, in following *Harper & Row's* holding that "under ordinary circumstances" there can be no fair use of an unpublished work,⁹⁵ refused to find a fair use here, even though one would assume that "under ordinary circumstances" necessarily implies that there must be *some* circumstances in which fair use would apply. The *New Era* court brushed this argument aside, and simply stated that, "[w]here use is made of material of an 'unpublished nature,' the second fair use factor [nature of the work] has yet to be applied in favor of an infringer, and we do not do so here."⁹⁶

It is particularly ironic to examine a review of the book at issue in *Harper & Row*. The book was rewritten after the Court's decision, omitting virtually all quotes and paraphrases, and substituting characterizations instead. Then, in a New York Times book review, the reviewer disagreed with the characterizations. "Sensing that his point cannot be made effectively by mere assertion, [the reviewer] undertakes to prove it by quoting from the letters that [were] deleted."⁹⁷ This "amusing consequence of the *Salinger* decision"⁹⁸ dramatically illustrates fair uses's function in furthering the creation of new works, while not harming the original works.

As it now stands, the right of first publication has, by virtue of the Court's opinion in *Harper & Row* and the Second Circuit's subsequent decisions, been imbued with a rigid statutory protection, making it even more difficult to believe that courts' future decisions will allow any fair use of unpublished works.⁹⁹ Moreover, the *New Era* decision seems to have cemented the *Salinger* decision. Combined with *Harper & Row*, these decisions probably bring us back full circle to the ancient common law in England. That common law allowed an author absolute control over his unpublished works on the grounds that unpublished work is private and a part of the creative process.¹⁰⁰ This effect leaves us in the uncomfortable position of determining exactly what is "published" as a threshold question before we can get to the issue of fair use.¹⁰¹ And paradoxically, delineating the moment of "publishing" is a question that the Copyright Act of 1976, in attaching protections at the moment of fixation instead of publication, specifically tried to avoid.

Perhaps more importantly, the effects of these decisions severely restrict *any* use of unpublished materials by historians, biographers, and even journalists until, generally, fifty years after the author's death.¹⁰² This result is instinctively wrong. As a society, we want journalists to be able to report that a major

95. *Harper & Row*, 471 U.S. at 539.

96. *New Era Publications Intern. v. Henry Holt & Co.*, 873 F.2d 576, 582-83 (2d Cir. 1989) (quoting from *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987)).

97. *New Era Publications Intern. v. Henry Holt & Co.*, 695 F. Supp. 1493, 1503 n.5 (S.D.N.Y. 1988) (citing Richler, *Rises at Dawn, Writes, Then Retires*, N.Y. Times Book Review, June 5, 1988, at 7 (reviewing I. HAMILTON, *IN SEARCH OF J.D. SALINGER* (1988))).

98. *New Era*, 695 F. Supp. at 1503 n.5.

99. Francione, *supra* note 87.

100. Kernochan, *supra* note 61.

101. Kernochan, *supra* note 61, at 341.

102. 17 U.S.C. §§ 301-05 (1976 Act).

automobile manufacturer's president sent a memo to its technicians (which would not constitute publishing) that read, "I realize the current placement of the car's gas tank will lead to many fatalities, but the money we'll make in the meantime is worth it." This type of use, together with critical commentaries and histories, seems precisely the type of work the Constitution's framers intended to encourage.

VI. THE UNJUSTIFIABLE JUSTIFICATION FOR OVER-PROTECTING UNPUBLISHED WORKS

The espoused reason for the zealous protection of unpublished works is that such protection somehow encourages creators to create. But close examination of this reason reveals its conclusory nature. Creators do not create because they know they will be able to *refrain* from publishing. They create because they know they have certain property-like rights in what they *do* decide to publish. The suggestion that creators will cease creating merely because earlier versions of their works are subject to fair use is untenable. The additional argument that prohibiting fair use of unpublished works benefits the owner economically, and in that way encourages creation is also unsound. Following this argument to its logical conclusion would dictate prohibition of all fair use, regardless of the published or unpublished status of the work, because that would always economically benefit the copyright owner. Thus, the fault with this argument is that pure economics is not the deciding factor of copyright decisions. Providing incentives to produce to as many individuals as possible is the correct determining factor. Copyright owners are granted rights, but these rights are not, and must not be, absolute.

Another purpose of over-protecting unpublished works, the one most probably protected by the common-law copyright, is to protect a creator's privacy. Commentators have noted that plaintiffs seeking to restrain publication of personal letters often do so for privacy reasons.¹⁰³ Furthermore, in Samuel Warren and Louis Brandeis' landmark article, they noted that, "The principle which protects personal writings and all other personal productions . . . against publication in any form, is in reality not the principle of private property, but that of an inviolate personality."¹⁰⁴ At least one commentator has also pointed out that "protection of privacy interests not denominated as such underl[y] . . . the right of the sender of a letter to first publication."¹⁰⁵ These are the same rights protected by common-law copyright in unpublished works.

103. See, e.g., Note, *Personal Letters: A Dilemma for Copyright and Privacy Law*, 33 *RUTGERS L. REV.* 134, 134 (1980).

104. Warren & Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193, 205 (1890) (arguing in part that an author's common-law right of first publication was not a property right at all but merely a rationalization for a right of privacy).

105. Note, *supra* note 103, at 140 (citing *Birnbaum v. United States*, 436 F. Supp. 967, 981 (E.D.N.Y. 1977), *modified*, 588 F.2d 319 (2d Cir. 1978) (common-law copyright protects both author's privacy and his pocketbook); *Rice v. Williams*, 32 F. 437, 439 (E.D. Wis. 1887) ("The letters here in question, were confidential, — . . . I would not hesitate, on grounds of morality . . . to make an example of this case, by putting upon it the stamp of judicial reprobation."); *In re Ryan's Estate*, 115 Misc. 472, 475, 188 N.Y.S. 387, 389 (Surr. Ct. 1921)

Because all works, whether published or not, are now granted the same "bundle of rights" by the Copyright Act, there is no purpose for a distinction based on published status other than privacy. Artists and writers nearly universally dislike earlier versions of their works and so seek to keep them from the public's eye. Protecting these works against any form of publication certainly protects their privacy, and perhaps their egos, but in no way furthers the goals of copyright law. Perhaps more importantly, even were we to use copyright to allow protection of privacy, that privacy would not be well protected, because copyright only protects expression, and not ideas,¹⁰⁶ which is what privacy most often seeks to protect.¹⁰⁷

The urge to protect a creator's privacy by protecting his unpublished works is noble, but misplaced. Such privacy should be protected by separate laws. So far, courts have generally refused to protect privacy.¹⁰⁸ If the law has generally refused to protect these privacy interests *qua* privacy interests, we should not allow their protection under the guise of copyright. Copyright is granted to authors for the sole reason of encouraging them to increase the store of society's knowledge, not to protect their privacy interests. Protecting privacy interests does not encourage authors to create more. After all, the author *does* have an enforceable copyright in his unpublished works. The rights in those works, however, like the rights in all published works, must be also subject to fair use.

VII. CONCLUSION

Due to the recent court decisions refusing to allow fair use of unpublished works, it is highly possible that we are painting ourselves into a copyright corner that may be unconstitutional. Using copyright to protect an author's privacy may be admirable, but it is beyond the constitutional mandate, and so is beyond constitutionality for copyright. Furthermore, there are no logical reasons, either in case law or in the Copyright Act, for giving extra protection to a fixed work simply because it remains unpublished. The only escape from this dilemma is to use the Copyright Act's fair use "guidelines" as a stepping-off point for a much larger, and much more important consideration: What is the *function* of the new work? If the function of the new work is the same as the original, then there should be no fair use, for the user has appropriated the first author's copyright. If the functions are not similar enough to displace the original work, the courts should deem the use "fair" and find no copyright infringement. To help courts determine the function of a work, the guidelines in the Copyright Act are useful, but courts should also consider Justice Story's admonition to look to the

("In a moral view, the publication of such letters . . . is perhaps one of the most odious breaches of private confidence, of social duty, and of honorable feelings, which can well be imagined.")).

106. 17 U.S.C. § 102(b) (1976 Act) states: "In no case does copyright protection for an original work of authorship extend to any idea . . ." *Id.*

107. Note, *supra* note 103.

108. See, e.g., Note, *supra* note 103, at 134 (noting that plaintiffs suing for unauthorized publications often sue for infringement of copyright as well as under various privacy theories, but the right "to be let alone" often fails in the face of various first amendment principles. Also citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (press permitted to publish name of deceased rape victim); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (press liable for erroneous publication in public interest only if matter published with knowing or reckless falsity)).

relationship between the two works: "If so much is taken, that the . . . labors of the original author are substantially to an injurious extent appropriated by another, . . . that is sufficient, in point of law, to constitute a piracy pro tanto."¹⁰⁹ And the final determination must be made by considering which outcome would most "promote the Progress of Science and useful Arts." If, as a society, we wish to protect privacy, we should do so under state or federal privacy laws, and leave to copyright its only constitutional purpose: facilitating the free flow of useful information.

We must keep in mind that "[e]ven when balanced with conflicting social interest, the goals of the Constitution are best served by encouraging, not suppressing, individual expression."¹¹⁰

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109. *Folsom*, 9 Fed. Cas. at 348.

110. Comment, *supra* note 4, at 1045.